

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERTO LIBANI	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1992	:	
through February 28, 1993.	:	
<hr/>		DETERMINATION
		DTA NO. 814817
In the Matter of the Petition	:	
of	:	
ROBERTO LIBANI	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and for the Administrative Code	:	
of the City of New York for the Periods Ended	:	
June 30, 1990 and June 30, 1992.	:	

Petitioner, Roberto Libani, 245 East 54th Street, New York, New York 10022-4707, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1992 through February 28, 1993 and for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated June 14, 1996 seeking summary determination with respect to four of the statutory notices petitioned in the above-referenced matter pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Gianfranco Ivarone, C.P.A., responded by an affidavit made by one John Ghedini, dated July 3, 1996, and received by the Division of Tax Appeals on July 5, 1996. Accordingly, the 90-day period for the issuance of this determination pursuant to

section 3000.5(d) of the Rules commenced on July 5, 1996. Based upon the motion papers, the affidavits submitted therewith and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether The Division of Taxation properly dismissed petitioner's requests for a conciliation conference, filed in respect of certain notices of determination and deficiency, as untimely filed.

FINDINGS OF FACT

1. The issue raised by the motion brought by the Division of Taxation ("Division") is whether petitioner timely protested four notices of deficiency/determination numbered as follows: L010205550, L010205551, L010205575, and L010205576. Petitioner filed requests for a conciliation conference in respect of these four notices of determination/deficiency on November 3, 1995.

2. Pursuant to conciliation orders dated February 23, 1996, the Bureau of Conciliation and Mediation Services ("BCMS") denied the above-referenced requests as untimely filed.

3. Also of relevance to this matter is a Notice of Determination dated April 3, 1995 and addressed to petitioner at the address listed above. Said notice bore a certified number of P 911 206 910 and a notice number of L010205552 and assessed sales tax due for the period ended August 31, 1992. Petitioner filed a request for a conciliation conference in respect of this notice on June 22, 1995. The Division concedes that said request was timely filed. Consequently, petitioner's protest of notice number L010205552 is not the subject of the Division's motion herein.

4. By Conciliation Order dated January 12, 1996, notice number L010205552 was sustained.

5. Petitioner subsequently filed a petition with the Division of Tax Appeals in respect of all five of the statutory notices referred to herein. In its answer filed in response to the petition,

the Division asserted that BCMS properly dismissed as untimely petitioner's requests for a conciliation conference in respect of the notices referred to in Finding of Fact "1".

6. The Division did not submit copies of the statutory notices numbered L010205550, L010205551, L010205575, and L010205576 into the record herein. The Division did submit microfiche copies of such notices. It is the Division's regular business practice to retain microfiche copies of statutory notices for the purposes of reducing paper usage and the amount of personnel resources devoted to the filing of hard copies of statutory notices.

7. Both microfiche and hard copies of statutory notices are created from assessment data which is entered into the Division's CARTS (Case and Resource Tracking System) computer system by Division employees. Such data is organized by the computer's "Create Assessment" program which, among other things, assigns assessment numbers to the data and sets up a CARTS case in the computer system for each such assessment number.

8. The CARTS System also has a pre-sort procedure program the purpose of which is to prepare statutory notices for mailing. As part of this program, bar codes are placed on the statutory notices and a certified mail control number is assigned to each notice. This number will correspond with the certified control number appearing on the certified mailing record (see, Finding of Fact "13") and with the certified mail documentation affixed to the envelope at the time of mailing.

9. Since both are created from the same data, the content of the microfiche copy of a statutory notice is, with minor exceptions, identical to that of the hard copy. The major difference between the microfiche and the hard copy is the format in which the data is arranged.

10. The facts set forth above in Findings of Fact "6" through "9" were established through affidavits of Carl Moeske, who is employed as an Associate Computer Programmer Analyst in the Division's Information Systems Management Bureau. As part of his regular duties, Mr. Moeske oversees the daily computer operations of the Division's computer system, which stores information and generates printed documents, including statutory notices, which are sent to taxpayers.

11. Each of the microfiche copies of statutory notices numbered L010205550, L010205551, L010205575, and L010205576, which were submitted by the Division herein, lists an anticipated mailing date of April 3, 1995 and petitioner's name and address as 245 East 54th Street, New York, New York 10022-4707. The microfiche copies also indicate the Division's position that petitioner was an officer/responsible person of Gian Marco Venturi Madison Ave., Inc. and was therefore personally liable for the sales tax assessed pursuant to sections 1131(1) and 1133(a) of the Tax Law, or for withholding tax penalty pursuant to section 685(g) of the Tax Law.

12. The microfiche copies of the statutory notices also contain the following information:

<u>Assessment Number</u>	<u>Certified Control Number</u>	<u>Period Ended</u>	<u>Type of Tax</u>
L010205550	P 911 206 908	2/28/93	Sales
L010205551	P 911 206 909	11/30/92	Sales
L010205575	P 911 206 911	6/30/92	Withholding
L010205576	P 911 206 912	6/30/90	Withholding

13. The Division's CARTS Control Unit's computer preparation of notices of determination/deficiency, such as those at issue herein, also includes the preparation of a certified mailing record ("CMR"). The CMR lists those taxpayers to whom notices of determination/deficiency are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the certified mailing record to the CARTS Control Unit.

14. Each computer-generated notice of determination/deficiency is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The

initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case page 1 of the CMR lists an initial date of March 25, 1995, which has been manually changed to April 3, 1995.

15. After a notice of determination is placed in the Division's Mail and Supply Room ("mailroom") "Outgoing Certified Mail" basket, a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a mailroom employee delivers the stamped envelopes and the associated CMR to the Colonie Center Branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and/or his signature to the CMR.

16. In the ordinary course of business a mailroom employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

17. The CMR relevant to this case is an 22-page, fan-folded (connected) computer-generated document entitled "Certified Record for Non-Presort Mail". This CMR lists consecutive certified control numbers P 911 206 843 through P 911 207 082, inclusive. Each such certified control number is assigned to an item of mail listed on the 22 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The CMR herein lists 240 items of mail corresponding to the 240 certified control numbers listed thereon and there are no deletions from the list.

18. Information regarding the notices of determination/deficiency at issue is contained on pages six and seven of the CMR. Specifically, corresponding to certified control numbers P 911 206 908 through P 911 206 912 are notice numbers L010205550, L010205551, L010205552, L010205575 and L010205576, respectively, along with information listing

petitioner's name and address, which is identical to that listed on the notices of determination/deficiency described herein. The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

19. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated April 3, 1995.

20. In addition to bearing a Postal Service postmark dated April 3, 1995, the last page of the CMR, page 22, indicates "total pieces" listed thereon of 240. This figure has been manually circled and beneath it is the signature or initials of a Postal Service employee.

21. Appearing immediately beneath the "total pieces" listing is the confirmatory listing "Total Pieces Received at Post Office". No information appears after this listing.

22. The affixation of the Postal Service postmark, the signature or initials of the Postal Service employee, and the circling of the "total pieces listed figure indicate that all 240 pieces listed on the CMR were received at the post office.

23. The Division generally does not request, demand, or retain return receipts from certified or registered mail.

24. The facts set forth above in Findings of Fact "13" through "23", were established through the affidavits of Geraldine Mahon and Daniel G. LaFar. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of determination/deficiency such as those at issue herein. Mr. LaFar is employed as a Principal Mail and Supply Clerk in the Division's mailroom. Mr. LaFar's duties include supervising mailroom staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

25. The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received (see, Finding of Fact "22") was established through the affidavit of Mr. LaFar. Mr. LaFar's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center specifically requested that Postal

Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

26. The Division also submitted affidavits made by one Monica Amell, who is employed as a Senior Mail and Supply Clerk in the Division's Registry Unit. As part of her duties, Ms. Amell prepares US Postal Service Form 3811-A for mailing. According to Ms. Amell's affidavits and the relevant portion of the Domestic Mail Manual, Issue 48, dated 1/1/95 (a copy of which was attached thereto), the Postal Form 3811-A is a form used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office where the piece of mail in question was delivered. The delivery post office then completes the form by providing the mailer the delivery date and the name of the individual or organization that postal delivery records show received the mail. Form 3811-A does not provide the mailer with the recipient's signature.

27. Attached to Ms. Amell's affidavits are the Form 3811-A's which were requested for petitioner herein. Ms. Amell prepared the forms in question and mailed such forms on May 14, 1996. Part of the Form 3811-A is completed by the mailer, i.e. the Division. In this case, box 3, 4, and 5 on each Form 3811-A list the address listed on the article as indicated by the Division's records, the certified mailing number, and the mailing date. This information is consistent with the information contained in the certified mailing record. Boxes 9 and 10 of each of the Form 3811-A's have been completed by the delivery post office as follows: Box 9 states a delivery date of April 8, 1995 and handwritten under the heading "Address" in box 10 is "245 E 54".¹ Additionally, box 8 of the Form 3811-A corresponding to certified number P 911 206 908 indicates that the article in question was delivered to the addressee, i.e, petitioner. The box 8 entries for the other four 3811-A's are blank.

28. Along with each Form 3811-A completed as described, the delivery post office also returned to the Division a copy of a Postal Service Form 3883-A ("Firm Delivery Receipt"). Handwritten in a box on this form under the heading "Mail For" is petitioner's name and

¹Box 8 of the 3811-A corresponding to certified number P 911 206 909 states a delivery date of "4-8-96"(emphasis supplied). It is concluded that this "96" entry was erroneous and that "95" was intended.

address. Listed on the form under the heading "Article Number" are the five certified numbers referred to previously herein. Below this listing the form states: "A total of 0005XXX articles described above were received." Beneath this statement the number 5 has been handwritten. The form also contains a handwritten entry indicating a date of delivery of "4-08-95" and a signature under the heading "Delivered By (Carrier)". Additionally, the form contains a signature under the heading "Addressee" and the postmark of the delivery post office dated April 8, 1995.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1) such a determination "shall finally and irrevocably fix the tax" unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to this provision, then, petitioner had 90 days from the issuance of the subject notices of determination to file a request for a conciliation conference.

B. Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." This section further provides that the mailing of such a notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." (Id.)

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice "shall be mailed by certified or registered mail to the

taxpayer at his last known address." A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with the Bureau of Conciliation and Mediation Services, within 90 days of the mailing of the notice of deficiency (see, Tax Law §§ 689[b], 170[3-a][a]).

D. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (id.). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (see, Matter of Accardo, Tax Appeals Tribunal, August 12, 1993).

E. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (see, Matter of Katz, *supra*; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Moeske, Ms. Mahon and Mr. LaFar, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency/determination (see, Findings of Fact "10" and "24").

G. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the notices of determination/deficiency at issue were mailed to petitioner on April 3, 1995. Specifically, this 22-page document lists sequentially numbered certified control numbers with corresponding names and addresses. No entries on this document have been

deleted. All 22 pages of the CMR bear a U.S. Postal Service postmark dated April 3, 1995. Additionally, a postal employee circled the total pieces listed figure and signed page 22 of the CMR to indicate receipt by the post office of all pieces of mail listed thereon.² This evidence is sufficient to establish that the Division mailed the subject notices of determination/deficiency on the date claimed.

H. The Division also presented evidence of delivery and receipt of the relevant statutory notices. However, except with respect to the notice bearing certified number P 911 206 908, the Form 3811-A's presented herein are incomplete in that the box 8 entry has been left blank (see, Finding of Fact "27"). These incomplete forms thus fail to prove receipt. Additionally, the Form 3883-A could have provided highly probative evidence of delivery and receipt except that the record contains no foundational evidence regarding this document, such as the purpose of the form and when and by whom it was completed.

It should be noted that the Division's failure to prove delivery in this matter is not particularly significant since the Division has proven mailing of the subject notices on the date claimed.

I. In opposition to the Division's motion, petitioner submitted the affidavit of John Ghedini, an accountant employed by petitioner's representative, who serviced Gian Marco Venturi Madison Ave., Inc. and who

prepared the timely request for conciliation conference filed in respect of notice number L010205552. In his affidavit, Mr. Ghedini stated that, since "all" of the assessments arrived simultaneously, he believed that the one assessment number listed on the request filed for notice number L010205552 would trigger all of the other assessments in question. Mr. Ghedini stated that he believed that the inclusion of the other assessment numbers was "superfluous" and that there was no reason for petitioner to have singled out one of the assessments and to have excluded the others. Mr. Ghedini further stated that he adhered to the spirit of the law if not the

²This fact was established through the affidavit of Mr. LaFar which specifically set forth the basis of Mr. LaFar's knowledge for this proposition (cf., Matter of Roland, Tax Appeals Tribunal, February 22, 1996).

substance. The affidavit also addressed the substance of petitioner's claim that he was not a responsible officer of Gian Marco Venturi Madison Ave., Inc.

The contentions raised in the affidavit of Mr. Ghedini are rejected. The Tax Law provides that unless a notice of determination/deficiency is timely protested, it shall become fixed and subject to collection and levy (see, Tax Law §§ 681, 1138). Clearly, each such notice must be protested (see, 20 NYCRR 3000.3[b], 4000.3[b]), for there is no statute or caselaw to support the proposition advanced by petitioner that a protest of tax for a specific period and a specific tax constitutes a valid protest of a statutory notice for a different period and/or a different tax (see, American Radiator & Standard Sanitary Corp. v. United States, 318 F2d 915, 63-2 USTC ¶ 9525 at 89,179; cf., Matter of Crispo, Tax Appeals Tribunal, April 13, 1995).

With respect to the statements made in Mr. Ghedini's affidavit regarding the merits of petitioner's protest, it is well established that, absent a timely filed request for a conciliation conference or petition, BCMS and the Division of Tax Appeals are precluded from considering the merits of a case, having no jurisdiction over the matter (see, Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

J. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party.

K. In the instant matter there are no material issues of fact. Accordingly, pursuant to the foregoing discussion and section 3000.9(b)(1) of the Rules, the Division of Taxation is entitled to summary determination in this matter.

L. The Division's motion for summary determination is hereby granted and the petition of Roberto Libani is dismissed with respect to the notices numbered L010205550, L010205551, L010205575 and L010205576. A hearing on notice number L010205552 shall be scheduled in due course.

DATED: Troy, New York
October 3, 1996

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE